

Triple A Fire Protection, Inc. and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL-CIO. Case 15-CA-11498

October 19, 1993

ORDER REMANDING

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On March 26, 1993, Administrative Law Judge Richard J. Linton issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs. The General Counsel and the Charging Party also filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to remand the proceeding to the judge for consideration of the complaint allegations in light of our findings set forth below.

The complaint alleges, inter alia, that the Respondent violated Section 8(a)(5) and (1) of the Act by ceasing to make fringe benefit contributions and changing the wage rates of employees provided for in the expired collective-bargaining agreement between the Respondent and the Union. The judge found that the agreement was an 8(f) contract and therefore the Respondent was free to repudiate it on expiration. We disagree with the judge.

The Respondent is an Alabama corporation engaged in the construction industry installing sprinkler systems. For several years, the Union has entered into national collective-bargaining agreements with the National Fire Sprinkler Association, Inc. Since 1983, the Respondent has been party to successive national collective-bargaining agreements, the latest effective from April 1, 1988, through March 31, 1991.

In early October 1987, the Union sent a letter to the Respondent requesting that the Respondent sign a form recognition agreement. The purpose of obtaining the signed form was to "solicit [the Respondent's] cooperation in minimizing any possible disruption to our relationship that might otherwise be caused by the *Deklewa*¹ decision," and to confirm the Union's "status as the current exclusive bargaining representative of your sprinkler fitter employees under the National Labor Relations Act." The Union enclosed a copy of a fringe benefit report form and the recognition form.

The recognition form, signed on October 19, 1987, by the Respondent's president, Alton Turner, reads:

**ACKNOWLEDGEMENT OF THE
REPRESENTATIVE STATUS
OF ROAD SPRINKLER FITTERS
LOCAL UNION NO. 669, U.A., AFL-CIO**

The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by, Road Sprinkler Fitters Local Union No. 669, U.S., AFL-CIO, for purposes of collective bargaining.

The Employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

The Union states in its letter that the enclosed fringe benefit form, covering the weeks ending May 30 through June 20, 1987, "confirms that all, or nearly all, of your sprinkler fitter employees are members of and represented by Local 669." The form lists eight names, including Respondent President Alton Turner and his son, a supervisor. Turner testified that before March 1991, the greatest number of workers employed for a given month was seven or eight.

On March 26, 1991, the Respondent informed the Union that, effective on the expiration of the contract on March 31, it would no longer adhere to the extant wage and benefit terms and conditions of employment.

The judge rejected the contention of the General Counsel and the Union that the Union in 1987 attained the status of a 9(a) representative. He found that although the Respondent voluntarily recognized the Union as the exclusive 9(a) representative of its employees and the fringe benefit reports reflected that a majority of the Respondent's sprinkler fitter employees were then members of the Union, the transformation from 8(f) to 9(a) status requires a more "affirmative" showing of majority support "manifested" by unit employees. The judge concluded that the General Counsel and the Union failed to carry their burden of establishing that the Union's 8(f) contractual status with the Respondent matured into a relationship under Section 9(a) of the Act. He therefore dismissed the complaint.

We do not agree with the judge. The record establishes that the Union made an unequivocal demand for recognition as the 9(a) representative of the Respondent's unit employees and proffered to the Respondent documentary evidence which was purported to support the Union's claim of majority status. By executing the acknowledgement, the Respondent voluntarily and unequivocally granted recognition to the Union as 9(a) representative. It is clear that the parties intended to establish a bargaining relationship under Section 9(a)

¹ *John Deklewa & Sons*, 282 NLRB 1375 (1975), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

of the Act. See *Golden West Electric*, 307 NLRB 1494 (1992).

Contrary to the approach of the judge and the Respondent,² we will not at this late date inquire into the Union's showing of majority status. In *Deklewa*, the Board stated that unions should not have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry. In nonconstruction industries, if an employer grants Section 9 recognition to a union and more than 6 months elapse, the Board will not entertain a claim that majority status was lacking at the time of recognition. As parties in the construction industry are entitled to no less protection against such late claims, we will not entertain a challenge here, where the Respondent voluntarily recognized the Union as a 9(a) representative in 1987 and waited until 4 years later to object. See *Casale Industries*, 311 NLRB 951 (1993), which issued after the judge's decision in the instant case.³

Because he dismissed the complaint based on his threshold finding that the agreement between the parties was an 8(f) and not a 9(a) contract, the judge did not address the issue of whether the Respondent may have been privileged to implement changes in wages and fringe benefit contributions because of impasse or other reasons. We shall remand the proceeding for a resolution of the complaint's unilateral change and other allegations in light of our reversal of the judge's 8(f) finding.

ORDER

IT IS ORDERED that the proceeding is remanded to the judge for resolution of the complaint allegations in light of our determination above.

IT IS FURTHER ORDERED that the judge shall prepare and serve on the parties a supplemental decision setting forth credibility resolutions, findings of fact, and conclusions of law and recommendations as found necessary consistent with the remand. Copies of the supplemental decision shall be served on all parties after

²The Respondent contends that the Union was not a 9(a) representative because the Union did not represent an uncoerced majority of its unit employees, arguing that it had unlawfully assisted the Union in the past and that the Union's acts had coerced a majority into supporting the Union.

³In joining his colleagues in finding that the agreement between the parties was a 9(a) contract, Member Devaney relies on the parties' clear expression of their intent in October 1987 that they were establishing a 9(a) bargaining relationship. See *Comtel Systems Technology*, 305 NLRB 287, 291 (1991) (Member Devaney, dissenting). Member Devaney did not participate in *Casale Industries* and does not rely on the 6-month time limit on construction industry employers' challenges to 9(a) relationships set forth therein. In his view, the basis for applying a 10(b) limitations period in the nonconstruction industry workplace, where minority recognition is unlawful, does not hold in the construction industry, where there is no statutory prohibition on minority recognition.

which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Keith R. Jewell, Esq., for the General Counsel.

Willis C. Darby Jr., Esq., of Mobile, Alabama, for the Respondent.

Richard W. Gibson, Esq. (Beins, Axelrod, Osborne & Moon-ey), of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This construction industry case of unilateral changes and direct dealing involves Sections 8(f) and 9(a) of the Act. Resolution of the legal issues is governed by the principles enunciated by the Board in *John Deklewa & Sons*, 282 NLRB 1375 (1987). Finding that the General Counsel failed to establish that the Union's 8(f) status with Triple A matured into a 9(a) relationship with the Company, I dismiss the complaint.

The main question here is whether a contract, permitted under Section 8(f) of the Act, was transformed in October 1987 into a relationship in which the Union would enjoy the full benefits of Section 9(a) of the Act. The answer to that question depends on resolution of a subsidiary issue concerning whether the General Counsel and Local 669 demonstrated that the Union, in October 1987, made a "clear showing" of majority status among Triple A's sprinkler fitter employees.

The subsidiary issue turns on the linchpin question of whether majority status can be demonstrated by the union membership reflected by fringe benefit reports, or whether majority status must be manifested by some overt action of the employees themselves (such as signing authorization cards or answering questions in a poll). Finding that the Board requires the latter, while the General Counsel proved only the former, I dismiss the complaint in its entirety. Allegations of direct dealing fall with the complaint because they depend on 9(a) status, a status Local 669 never achieved.

I presided at this 7-day trial, opening August 25, 1992, and closing December 17, 1992, in Mobile, Alabama, pursuant to the September 27, 1991 complaint issued by the General Counsel of the National Labor Relations Board through the Acting Regional Director for Region 15 of the Board. The complaint is based on a charge filed April 4, 1991, and later amended, by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Road Sprinkler Fitters Local Union No. 669, AFL-CIO (the Union, Local 669, or the Charging Party) against Triple A Fire Protection, Inc. (Respondent, the Company, TAF, or Triple A).

In the complaint, the General Counsel alleges that Respondent TAF violated Section 8(a)(1) and (5) of the Act, when (1) Alton Turner (Turner), the Company's president, bypassed the Union and dealt directly with TAF's employees by various acts between about late February and March 1991, and (2) when Steve Turner, an admitted supervisor of the Company, also bypassed Local 669 about March 1991. The complaint also alleges that since about April 20, 1991, the Company unilaterally (1) has ceased making fringe benefit payments required by the collective-bargaining agreement

(CBA) and (2) has changed the wage rates of employees covered by the CBA which expired March 31, 1991.

Aside from admitting some facts, Triple A denies any violation of the Act, alleges that the CBA was an "8(f)" prehire agreement, and asserts three affirmative defenses: (1) the Union has never represented an uncoerced majority of Triple A's employees in an appropriate unit; (2) since March 1, 1990 (at trial TAF's counsel gives the more likely date of April 1, 1991), the Union has failed to bargain in good faith with the Company; and (3) the Union waived any right it may have had to bargain over proposed changes in wage rates and fringe benefits by failing to act with due diligence.

Based on the motions, the due date for the filing of posthearing briefs was extended to Monday, March 8, 1993. The parties have filed briefs. The General Counsel and the Union filed their briefs by the due date. Because it was unable to meet the extended deadline, TAF submitted its first 44 pages, which were received on the March 8 due date, explaining that the balance would follow. On Tuesday, March 9, the balance of TAF's 101-page brief (plus attachments) was received. Tables for contents and authorities were received Thursday, March 11. Also received on March 11 was Triple A's unverified motion to file, under 29 CFR § 102.111(c), its brief was 1 day late. On Friday, March 12, the Division of Judges' Atlanta office received the March 11 affidavit (required by Rule 102.111(c) of TAF's attorney, Willis C. Darby Jr., in support of TAF's motion.

In his affidavit Darby describes his efforts to complete and mail TAF's brief on Saturday, March 6. No description is given for events before March 5. Despite work of 14 hours on Friday and 12 hours on Saturday by Darby and four clerical employees in completing the brief and verifying references, the brief was not ready to deliver to Federal Express by its 5 p.m. closing time on Saturday, March 6. Darby implies that if Federal Express had been available on Sunday, March 7, TAF could have filed its brief on time.

Darby further asserts in his affidavit that before mailing his completed brief he had not received any mail during March from the General Counsel or the Union, and he had not yet claimed two certified envelopes waiting for him. The suggestion is that he did not receive and read their briefs before completing and mailing TAF's. By Thursday, March 11, Darby concludes, the General Counsel had informed him he intended to oppose the late filing, and union counsel stated he had not decided. Since then the Union has filed its March 12 response in which, taking no position, it defers to the judge's "sound discretion." By his written response of March 16, 1993, the General Counsel also takes no position and, like the Union, leaves the matter to the judge's discretion.

Under 29 CFR § 102.111(c), a brief may be filed late on a showing of good cause based on "excusable neglect" when "no undue prejudice would result." A motion shall be filed stating the grounds relied on. "The specific facts relied on to support the motion shall be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts."

Granting TAF's motion will not result in any undue prejudice. TAF's brief was only one day late (and probably would have been timely if there had been overnight mail pickup service on Sundays), it appears that Attorney Darby did not receive and read the briefs of opposing counsel during the

interim, and because the slight delay will not result in delay of this decision, I shall grant TAF's motion to file its brief one day late. Because there is no right to file reply briefs before judges (and because counsel for the General Counsel and the Union telephonically informed the Division of Judges' Atlanta office that they were not going to seek to file reply briefs), I need not wait for reply briefs under any extension of time contemplated by Rule 102.111(c) for a responding document.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel (whose brief includes a proposed order and notice), Local 669, and Triple A, I make the following

FINDINGS OF FACT

I. JURISDICTION

An Alabama corporation, Respondent Triple A operates from Semmes (Mobile), Alabama, where it is engaged in the nonretail installation of sprinkler systems. During the 12 months ending August 31, 1991, the Company purchased and received at its Semmes facility goods and materials valued at \$50,000 or more direct from points outside Alabama. Respondent TAF admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION INVOLVED

TAF admits, and I find, that Road Sprinkler Fitters Local Union No. 669 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Collective-bargaining history

Alton Turner began working in the sprinkler fitting industry about 1972 or 1973. (Tr. 6:1029, 1155.) At that time he joined Local 669. (Tr. 6:1027.) Some 10 years later, about 1983, Turner founded his own the Company to engage in that business, incorporating Triple A about 1983. (Tr. 1:190; 2:290.) Turner, who is president of TAF, holds a 51-percent majority of the Company's stock and runs the business. (Tr. 1:191.) Turner's wife, Lovina, owns the balance of the stock and is TAF's secretary and treasurer. (Tr. 7:1252-1253, 1269.) She also serves as Turner's office secretary. (Tr. 1:198, 215; 7:1253.) Turner's son Steve is an acknowledged statutory supervisor for TAF. Other family members also work for TAF. (Tr. 7:1253-1254.)

Local 669 is headquartered in Landover, Maryland (Tr. 2:319), where H. V. Simpson is the Union's business manager. (Tr. 1:125; 2:319.) Ronnie L. Phillips has worked 15 years for Local 669, and is a business agent of the southern district and a regional representative for the Union. His area covers Alabama, Mississippi, and Puerto Rico. Since 1983

¹ Unless otherwise indicated, all dates are for 1991. References to the seven-volume transcript of testimony are by volume and page. Exhibits are designated G.C. Exh. for the General Counsel's, C.P. Exh. for the Union's, and R. Exh. for Respondent TAF's.

Phillips, on behalf of the Union, has dealt with Turner respecting all matters between Local 669 and TAF. (Tr. 2:299–300; 316; 4:650; and 5:819.)

The Union's territorial jurisdiction receives different descriptions in the record. (Tr. 1:34; 2:319; 5:836–838, 855–856, 881.) However, articles in the 1988–1991 national CBA (G.C. Exh. 21; R. Exh. 41) for recognition (art. 3) and territory (art. 6) disclose that it covers offshore drilling operations plus 47 States and the District of Columbia, but not Connecticut (Local 676), Florida (Local 821), and the territory covered by Locals in some 18 cities. Rhode Island apparently is covered by the Providence Local. The matter of TAF's desire to be able to do business outside Alabama, particularly in Florida, arose during the negotiations between Local 669 and TAF.

For years Local 669 has entered into national CBAs with the National Fire Sprinkler Association, Inc. (NFSA). A copy is in evidence, for historical purposes only (Tr. 6:1049), of the CBA for April 1, 1982, through March 31, 1985. (R. Exh. 18.) In October 1983 Turner, as president of TAF, signed an interim agreement (R. Exh. 20) to be bound to the 1982–1985 contract (Tr. 1:192; 6:1051), and on February 8, 1984, he signed a one-page (R. Exh. 22; Tr. 7:1288) amendment to the economic package. Turner also signed to be bound to the national CBA of 1985–1988. (G.C. Exh. 20; G.C. Exh. 2; Tr. 1:193–194.)

Triple A, by Turner, also signed (G.C. Exh. 2; Tr. 1:193–194) to be bound to the national CBA of April 1, 1988, through March 31, 1991 (G.C. Exh. 21; R. Exh. 41; Tr. 2:301). As we shall see, on March 31, 1991, the 1988–1991 CBA expired as to TAF. On April 9 the Union and TAF began independent negotiations for a CBA, but after a dozen or so meetings, the last one held in July 1992, there still was no agreement for a replacement contract. The 1988–1991 CBA's recognition clause, in article 3, provided:

Recognition: The National Fire Sprinkler Association, Inc. for and on behalf of its contractor members that have given written authorization and all other employing contractors becoming signatory hereto, recognize the Union as the sole and exclusive bargaining representative for all Journeymen Sprinkler Fitters and Apprentices in the employ of said Employers, who are engaged in all work as set forth in Article 18 of this Agreement with respect to wages, hours and other conditions of employment pursuant to Section 9(a) of the National Labor Relations Act.

In early October 1987 (Tr. 1:138), from its national office in Landover, Maryland, Local 669 Business Manager H. V. Simpson (Tr. 1:125) mailed letters (Tr. 1:127), with enclosures, "To All Independent Contractors," some 400 in number (Tr. 1:132). A copy of the letter, in evidence (C.P. Exh. 1), reads:

As a contractor signatory to the 1985–1988 collective bargaining agreement with Local 669, it can come as no surprise to you that Local 669 is the designated and exclusive bargaining representative of your sprinkler fitter employees, almost all of whom are 669 members.

Earlier this year, the National Labor Relations Board in Washington, D.C. issued a decision in *John Deklewa*

and Sons, 282 NLRB [1375] (1987), which, if it stands on appeal, may throw into question the nature of the relationship between your organization and Local 669. The purpose of this letter is to solicit your cooperation in minimizing any possible disruption to our relationship that might otherwise be caused by the *Deklewa* decision.

Enclosed is a copy [C.P. Exh. 3; Tr. 1:128, 130] of a recent fringe benefit report filed by your organization with the N.A.S.I. Funds. [National Automatic Sprinkler Industry Fringe Benefit Funds.] Upon reviewing it, you will note that it accurately confirms that all, or nearly all, of your sprinkler fitter employees are members of and represented by Local 669. Also enclosed is a form recognition agreement [C.P. Exh. 2; Tr. 1:128, 131–132] reflecting that fact and Local 669's status as the exclusive bargaining representative of your sprinkler fitters. Please review the enclosed and return an executed copy of the recognition agreement to this office. The only significance of the agreement is that it confirms Local 669's status as the current exclusive bargaining representative of your sprinkler fitter employees under the National Labor Relations Act.

Because of our concern over the possible and unnecessary disruptive effects of *Deklewa*, we have determined to initiate legal proceedings with the National Labor Relations Board with respect to any contractor who declines to execute and return the enclosed form. We need your response within fourteen (14) days.

Please accept our regrets for any inconvenience caused by this request. The National Labor Relations Board, not Local 669, is the villain of this piece.

Thank you for your cooperation. We look forward to a harmonious and mutually beneficial relationship with your organization for years to come.

The recognition form (C.P. Exh. 2) enclosed, signed on October 19, 1987 by Turner on behalf of TAF (Tr. 1:197; 2:291), reads:

ACKNOWLEDGEMENT OF THE
REPRESENTATIVE STATUS
OF ROAD SPRINKLER FITTERS LOCAL
UNION NO. 669, U.A., AFL–CIO

The Employer executing this document below has, on the basis of objective and reliable information, confirmed that a clear majority of the sprinkler fitters in its employ have designated, are members of, and are represented by, Road Sprinkler Fitters Local Union No. 669, U.S., AFL–CIO, for purposes of collective bargaining.

The Employer therefore unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act.

The fringe benefit form (C.P. Exh. 3) lists eight names, including two Turners (Alton, the president, and his son Steve, the acknowledged supervisor). Two of the names (W. A. Hudspeth and R. S. Vernon) are shown as having worked no hours during the 4-week covered period for the weeks ending

May 30 through June 20, 1987. The other four individuals listed are: C. W. Aikens, J. R. Moiren, P. A. Thames, and G. J. Andrews. Turner testified that before March 1991 the greatest number of employees he had for a given month was seven or eight. (Tr. 6:1156.) At the hearing the General Counsel introduced similar reports for October and November 1987 (G.C. Exh.s 4, 5) also reflecting union membership by TAF's sprinkler fitter employees.

In evidence is a copy (G.C. Exh. 26) of certain Alabama statutes, enacted in 1953, currently in force. Under these statutes, Alabama may be described as a right-to-work state. (Tr. 3:514-518; 4:653.)

2. Events preliminary to 1991-1992 negotiations

By letter dated December 14, 1990 (R. Exh. 5), the Union, by Business Manager Simpson, notified "All Independent Local 669 Contractors" of the Union's desire to negotiate a renewal CBA effective April 1, 1991. If a renewal contract were not reached before March 31, Simpson warned, "lawful economic action" could ensue on and after April 1. Simpson enclosed two copies "of our Assent and Interim Agreement" to consider, sign, and return. (Tr. 2:413.) A copy of the type of assent and interim agreement that was enclosed is separately in evidence as Respondent's Exhibit 14. (Tr. 3:621-624.)

Under the two-page assent and interim agreement form (R. Exh. 14) which Simpson mailed to TAF, the Union would agree not to strike to obtain a successor CBA to the one expiring March 31, 1991. The parties would agree, among other provisions, that all terms of the current CBA would remain in effect until the effective date of the successor CBA, with increases in wages and fringes retroactive to April 1, 1991.

Apparently around mid-March 1991 Simpson, Phillips testified (Tr. 2:415), telephoned Phillips and informed him that Turner had failed to sign and return the Assent and Interim Agreement. On March 18 Phillips telephoned Turner and, Phillips testified, asked if they could meet to discuss negotiations for a renewal contract. Turner said he had business in Atlanta the next day. They set no date to meet. (Tr. 2:302-303, 337; 3:578.) With an important exception, Turner's version of the call is generally consistent with that of Phillips. (Tr. 6:1086-1087.) The main difference is Turner's assertion that Phillips asked whether Turner was going to sign the interim agreement. (Tr. 6:1087.)

At several points in his testimony Phillips clearly denies that he even mentioned the interim agreement to Turner. (Tr. 2:373, 413, 417.) That was before it was disclosed that Turner had tape recorded the March 18 telephone conversation. A transcript (R. Exh. 11) of that telephone conversation was received in evidence. (Tr. 3:576, 609.) Later, in conjunction with other tape recordings excluded on the basis they pertained to settlement discussions of a related matter (Tr. 5:780, 790), the Union moved (C.P. Exh. 8; Tr. 4:641; 5:792; 6:942) to strike the transcript (R. Exh. 11). The General Counsel joined in that motion. (Tr. 6:948.) The Union so moves on the basis that Board policy excludes from evidence any secret tape recordings of conversations which involve contract negotiations. *Carpenter Sprinkler Corp.*, 238 NLRB 974, 975 (1978), *enfd.* on point 605 F.2d 60 (2d Cir. 1979). I postponed ruling until this decision. (Tr. 6:953.)

The taped telephone conversation of March 18 focused on the interim agreement and when the parties could meet and discuss contract negotiations. As such topics appear to fall within the rule of *Carpenter Sprinkler*, I grant the Union's motion, strike Respondent's Exhibit 11, and transfer it to the rejected exhibits file. On the same basis I transfer Respondent's Exhibit 94 to the rejected exhibits file. (Tr. 7:1297.) Respondent's Exhibit 94 is the transcript of a tape recording which Turner secretly made of his April 3, 1991 telephone conversation with Phillips concerning the beginning of contract negotiations.

Although Phillips testified that he never asked Turner to sign an interim agreement (Tr. 2:412; 3:577), he clearly asserts that he never mentioned the term (Tr. 2:373, 413, 417) during the telephone conversation. Later he admits that he did mention it and that when he did so he was referring to Respondent's Exhibit 14. (Tr. 3:622.)

On March 19, the day following the March 18 telephone conversation, Phillips made a surprise visit to Triple A and found Turner there. (Tr. 2:303, 337, 416; 6:1088.) Turner testified that the Atlanta trip canceled, but concedes he did not notify the Union. (Tr. 6:1168-1169.) Accompanying Phillips was Clarence Radecker (Tr. 2:304), a business agent from the Union's Arkansas-Louisiana District 6. (Tr. 7:1339.) Phillips testified that he went there to set up contract negotiations. (Tr. 2:304, 340, 416.) Phillips testified that Turner said he had no intention of negotiating a CBA with Local 669. (Tr. 2:304, 307.) (Radecker was not called as a witness until rebuttal and therefore did not address this visit.)

Turner testified that Phillips asked if Turner was going to sign the contract. Turner asked what the contract consisted of. (Jack Moiren and Alan Thames also were present.) It was not yet complete, Phillips advised. Phillips then called Turner aside and asked if Turner would go ahead and sign the (interim) agreement, that he had a copy in his briefcase in his car. (According to Phillips, Tr. 2:240, 417, neither he nor Radecker had a copy of the interim agreement with him that day.) "No," Turner responded, explaining that he would not sign a blank check. (Tr. 6:1088-1090.) At about that point Phillips said they had to discuss a contract. Turner said he was preparing a proposed contract to submit to him later. (Tr. 6:1130-1133.)

Two days later, by letter dated March 21 (G.C. Exh. 22), Phillips wrote Turner. After referencing their March 18 and 19 contacts, Phillips accused Turner of refusing to bargain, expressed puzzlement at that, and suggested a need "to avert a work stoppage on April 1, 1991." Crossing that letter in the mail was Turner's letter of March 21 (G.C. Exh. 7) transmitting TAF's proposal (G.C. Exh. 8) for a complete contract. (Tr. 1:220-222; 6:1157.)

In the meantime the Union had been alerting its membership to a possible strike beginning April 1. The Union's March 1991 newsletter (R. Exh. 88) did so. Business Manager Simpson, by a Special Strike Notice To All Members (R. Exh. 6), dated March 22, advised that effective April 1 "WE ARE STRUCK" against any contractor not named on an attached list of over 200 signatory contractors. Triple A is not one of the 200-plus names. (Tr. 2:427.) Phillips so notified TAF's employees when he met with them shortly before April 1. (Tr. 2:427; 5:920-921; 6:992-993.)

By letter dated March 26 (G.C. Exh. 9), Turner wrote Phillips that strike replacements would be hired and paid

under the terms of TAF's proposed CBA which TAF had mailed to the Union by letter of March 21. Current employees represented by the Union would continue to be paid under the CBA "until further notice." The further notice was expressed in a separate letter (R. Exh. 89) of the same date, March 26, in which TAF notified the International Union that TAF "hereby terminates" the CBA "effectively immediately or as soon as permitted by applicable law."

On March 28 (Tr. 7:1281) Turner, in a two-page memo (C.P. Exh. 5), summarized the CBA status, discussed union fines and possible options for employees who desire to work, notified TAF's employees that TAF would be open for business on April 1, and would have to operate with, if necessary, new employees.

Before April 1, however, Phillips told TAF's employees there would be no strike and to report to work on April 1. (Tr. 2:430; 6:993.) Phillips did not notify Turner there would be no strike. (Tr. 2:430.) There was no strike or picketing by the Union on April 1 at TAF. (Tr. 2:309, 318, 429; 6:1012-1013.) Turner thought there would be a strike on April 1 (Tr. 2:293), and he made preparations for a strike. (Tr. 6:1094.) There is no strike allegation in the complaint. TAF's position is that the strike notice bears on TAF's further position that the Union's contract demands caused an impasse. (Tr. 2:432-434.)

On April 3 Turner and Phillips agreed to meet for bargaining, and to hold the first session on April 9. (Tr. 2:309.) On April 4 Turner wrote (G.C. Exh. 10; R. Exh. 98) confirming a CBA meeting for April 9. (Tr. 1:227; 5:919; 6:1095.) Phillips confirmed by his letter of April 5. (G.C. Exh. 23; Tr. 2:310.) Turner observed that although TAF had forwarded a complete contract proposal, TAF had not received the Union's counterproposal and would like to have it for review before the April 9 meeting. The next day Phillips, by his letter of April 5 (G.C. Exh. 23, apparently crossing R. Exh. 98 in the mail), confirmed the first meeting date of April 9 for CBA negotiations, stated he had questions concerning TAF's proposed contract, and asserted that he had some contract proposals of his own which he would present at the meeting.

The parties held their first bargaining session on April 9, 1991, at the Bradbury Inn in Mobile. At this point, I pause only to list the dates of the 10 or so meetings. I write "or so" because the parties list 13 scheduled meetings even though bargaining occurred only at 9 or 10. For example, the parties refer to one meeting date, May 21, as a meeting. Although the third meeting was scheduled for May 21, TAF's representatives arrived a few minutes late, the Union left (there is a dispute whether the Union's representatives saw TAF's representatives entering the parking lot), and no bargaining occurred until the next day, May 22. Similarly, no bargaining occurred at the eighth meeting on October 8 because Turner, who had broken a tooth the previous evening, left early for an emergency dental appointment. Finally, no bargaining occurred at the 10th meeting on January 14, 1992. There is a dispute over attendance. Accordingly, the actual 10 bargaining sessions are (plus the aborted meetings of May 21, October 8, and January 14 shown in brackets):

- | | |
|--------------|---------------|
| 1. 4-9-91 | 8. [10-8-91] |
| 2. 4-30-91 | 9. 11-25-91 |
| 3. [5-21-91] | 10. [1-14-92] |
| 4. 5-22-91 | 11. 2-18-92 |

- | | |
|------------|-------------|
| 5. 6-25-91 | 12. 3-17-92 |
| 6. 6-26-91 | 13. 7-16-92 |
| 7. 8-28-91 | |

On April 10 the Union, by Business Manager Simpson, sent a two-page special notice (R. Exh. 104) to all members informing them that agreement had been reached for a renewal 3-year national CBA, wages retroactive to April 1 within 30 days of ratification. Phillips concedes that he never delivered a copy of the new (1991-1994) CBA to TAF. (Tr. 3:618, 621.) Although no copy of the national 1991-1994 CBA is in evidence, Simpson's April 10 announcement (R. Exh. 104) summarizes the highlights, including the increased wages and benefits, of that new contract. Following the final (and abbreviated) meeting on July 16, 1992, the Union wrote (R. Exh. 224) that it was willing to continue negotiations. TAF did not respond, and no further meetings have been held.

B. The Union's Lack of 9(a) Status

This case arises in the construction industry, and the case is controlled by the principles enunciated in *John Deklewa & Sons*, 282 NLRB 1375 (1975). One of those principles is this: "In light of the legislative history and the traditional prevailing practice in the construction industry, we will require the party asserting the existence of a 9(a) relationship to prove it." *Id.* at 1385 fn. 41. The General Counsel and Local 669 assert that they carried this burden by virtue of the earlier cited assents, acknowledgments, confirmations, and fringe benefit reports showing majority status by virtue of union membership in Alabama, a right-to-work state.

In determining whether the Union's 8(f) status with TAF was transformed into a 9(a) relationship, the focus is on October 19, 1987, when Alton Turner, TAF's president, signed the Acknowledgment of Representative Status (C.P. Exh. 2). Recall that in such acknowledgment Turner declares that a "clear majority" of TAF's sprinkler fitters are members of Local 669 and have designated the Union as their collective-bargaining representative. Turner then "unconditionally acknowledges and confirms that Local 669 is the exclusive bargaining representative of its sprinkler fitter employees pursuant to Section 9(a) of the National Labor Relations Act." When Turner signed TAF's assent to the 1988-1991 CBA, he recognized, as I quoted earlier, the Union as the exclusive bargaining representative for TAF's sprinkler fitter employees "pursuant to Section 9(a) of the National Labor Relations Act." The fringe benefit reports (C.P. Exh. 3; G.C. Exhs. 4, 5) apparently reflect that a majority, perhaps all, of TAF's sprinkler fitter employees were then members of Local 669.

The question is, did these acknowledgments, confirmations, and recognitions by Turner/TAF, plus the 1987 fringe benefit reports showing that a majority of TAF's sprinkler fitter employees were members of Local 669, achieve the Union's goal of transforming itself from an 8(f) limited representative to a 9(a) full representative of TAF's sprinkler fitter employees. The test for determining transformation from 8(f) to 9(a) status is set forth by the Board in *Deklewa*, *supra* at 1387 fn. 53 (emphasis added):

We do not mean to suggest that the normal presumptions would not flow from voluntary recognition accorded to a union by the employer of a stable work

force where that recognition is based on a *clear showing of majority support* among the unit employees, e.g., a valid card majority. *Island Construction Co.*, 135 NLRB 13 (1962). That is, nothing in this opinion is meant to suggest that unions have less favored status with respect to construction industry employers than they possess with respect to those outside the construction industry.

Copies of these acknowledgments are present in the recent case of *Excel Fire Protection Co.*, 308 NLRB 241 (1992). (The case involves the same Local 669.) The employer there confirmed, among other acknowledgments, that all of its sprinkler fitters were members of Local 669. The Board adopted Administrative Law Judge Pannier's finding of 9(a) status. As Judge Pannier observes, however, the employer respondent in *Excel* raised no issue about the majority status on which the acknowledgments and CBA were based. *Id.* at 433. Because no question was raised in *Excel* about majority status, it is questionable whether *Excel* resolves the issue here where TAF, unlike the passive position of the employer there, disputes the General Counsel's contention that the evidence shows majority status.

Does a showing of majority status by virtue of union membership, as exists here (based on the 1987 fringe benefit reports), satisfy *Deklewa's* requirement of a "clear showing"? In fact, the Board in *Deklewa*, at a point earlier than footnote 53, quotes the statement that union membership "is not always an accurate barometer of union support." *Deklewa* at 1383-1384. And fringe benefit reports are described there as demonstrating only "some degree of compliance with a benefit provision in the agreement." *Id.* at 1384. The one example the Board gave in footnote 53 for a "clear showing" is a showing by "a valid card majority." In short, the Board cited an affirmative expression by the employees themselves.

Language in subsequent cases repeat the need for the showing to be "affirmative." *Brannan Sand & Gravel Co.*, 289 NLRB 977, 979 (1988). Support must be "manifested" by the employees. *Comtel Systems Technology*, 305 NLRB 287, 289 (1991). Dissenting in *Comtel*, Member Devaney wrote, "if it is clear the parties understood they were entering into a 9(a) relationship, I would find a valid 9(a) relationship." *Comtel*, dissent. *Id.* at 292. At footnote 5 of his dissent, Member Devaney wrote that majority status may be shown, among other methods, by the union's assertion that it represents a majority. It appears that Member Devaney's dissenting position in *Comtel* would find 9(a) status here.

Nevertheless, the Board has held that union membership, even in a right-to-work state, does not satisfy the *Deklewa* requirement for a "clear showing." *J & R Tile*, 291 NLRB 1034, 1037 (1988). Thus, in the absence of a showing by valid card majority, a valid poll, or other objective method by which a majority of TAF's employees manifested their designation of the Union as their collective-bargaining representative, I find that the General Counsel and the Union failed to carry their burden of establishing that Local 669's 8(f) contractual status with TAF ever matured into a relationship under Section 9(a) of the Act. In short, the 1988-1991 national CBA, to which TAF was bound, was an 8(f) prehire contract as to Triple A.

C. Complaint Dismissed

1. Unilateral changes

Under *Deklewa*, a union signatory to an 8(f) prehire contract has only the limited 9(a) right to enforce the 8(f) agreement under Section 8(a)(5). *Deklewa* at 1387; *R & R Brickwork*, 299 NLRB 542 (1990). When an 8(f) contract expires, either party may repudiate so that there is no renewal or extension. *Deklewa* at 1387, 1388. When TAF, by letter of March 26, 1991 (R. Exh. 89), terminated the 1988-1991 CBA effective with the contract's March 31, 1991 expiration, TAF escaped its contractual and statutory relationship with Local 669. Accordingly, I shall dismiss the complaint paragraphs which allege that since about April 20, 1991, TAF (a) unilaterally ceased making fringe benefit payments required by the expired CBA (complaint par. 12), and (2) since about April 20 TAF has changed wage rates of unit employees (par. 13). Because the 8(f) contract had expired, and because the evidence fails to show that TAF at any time became the full 9(a) representative, beginning on April 1, 1991, Triple A had no obligation to continue honoring provisions of the expired 1988-1991 CBA or terms and conditions of employment which existed under that contract. In short, on and after April 1, 1991, TAF, under the Act, was free to do as it pleased respecting terms and conditions of employment.

In view of these findings, the matter of the negotiations and TAF's affirmative defenses, such as impasse, are rendered moot.

2. Direct dealing

a. Introduction

Turning now to the balance of the complaint's paragraphs, the direct dealing allegations, I note that TAF does not address them in its posthearing brief. No party discusses them in light of a possible finding of no 9(a) relationship. That is, even assuming that I credit (and I do) the General Counsel's evidence on the direct dealing allegations, can there be a direct dealing violation in the absence of a full 9(a) relationship? I find the answer to be no because the only rights and privileges Local 669 enjoyed under the 8(f) contract was the right to enforce the contract, under Section 8(a)(5), during the contract's term.

Although the complaint phrases the direct dealing allegations as Section 8(a)(1) and (5), as if they include allegations of independent coercion, such is not the case for two reasons. First, had the General Counsel intended to allege coercion, the complaint no doubt would have included (it does not) a conclusory allegation of coercion under Section 8(a)(1) of the Act. NLRB Pleadings Manual, section 901.1 at 250 (1991). Second, violations of Section 8(a)(5) derivatively violate Section 8(a)(1) of the Act, *Harris Painting*, 286 NLRB 642 (1987), as Section in 8(a)(5) and (1). In other words, the direct dealing incidents are not also alleged as coercion. Thus, with the incidents not resulting in 8(a)(5) violations, there necessarily is no derivative 8(a)(1) allegation. Accordingly, I shall dismiss the complaint in its entirety.

However, before dismissing the complaint, and from an abundance of caution on the matter, I shall make findings respecting the direct dealing allegations. Moreover, as the status of foremen as employees or supervisors is relevant both

to the direct dealing allegations and to the issue of majority status, I shall include findings on that topic as well.

b. *Alton Turner*

(1) Introduction

Witnesses who are either employees or former employees of the Company describe the following conversations. In his own testimony, Turner does not address these conversations. Aside from its argument that the foremen are supervisors (and therefore no violation in the conversations), TAF argues that even if the General Counsel's witnesses are credited, Turner's comments are not violative of the Act. I credit the General Counsel's witnesses and I would find the direct dealing violations if I were not dismissing the complaint.

(2) Complaint paragraphs 10(a) and (b)

Danny Carpenter worked for the Company from February 1988 to September 1991. (Tr. 1:172, 184.) He became a journeyman fitter in January 1991. (Tr. 1:173.) He and Turner were social friends, sipping beer on a few occasions. (Tr. 1:188–189.) About late February to early March 1993, Carpenter testified, as employees Carpenter, Jack Moiren, and Alan Thames were standing at the shop's doorway with Turner, Turner told the three employees that he might not sign the union contract and that he would guarantee each a foreman's job, pay their insurance, and provide them a truck.

About mid-March 1991, as Turner was visiting at Carpenter's house, Carpenter testified, Turner said he probably was not going to sign the upcoming union contract. Asking Carpenter to stay with TAF, Turner said he would raise Carpenter's pay to a foreman's rate. (Tr. 1:174–175, 184–186.)

(3) Complaint paragraph 10(c)

Jack Moiren worked at the Company for about 6 years, from 1985 to September 1991. (Tr. 1:65, 76, 83.) For his last several years at Triple A, Moiren worked as a foreman. (Tr. 1:65, 116.) Moiren has been a member of the Union for about 20 years. (Tr. 1:65.)

About early March at the shop, Moiren testified, Turner asked whether Moiren would stay with him if Turner went nonunion. Turner said that if Moiren stayed his pay would remain at the union rate, he would receive raises when union pay rates increased, would get to keep the company truck he was driving, with gas paid, that he would be provided insurance, and something would be worked out for retirement. (Tr. 1:66–67, 99–100.)

(4) Complaint paragraph 10(d)

Cecil P. "Shorty" Davidson has worked three different times for the Company, the first from October 1985 to about October 1986, again from September to November 1987, and finally from September 1989 to August 1991. (Tr. 1:40.) Davidson became foreman about February 1990 (Tr. 1:151), and was such in March 1991. (Tr. 1:151.)

About early to mid-March 1991, Davidson testified, he, Jack Moiren, Danny Carpenter, and the Turners (Alton, president and father, Steve, supervisor and son) had a lengthy conversation on the front porch of the Company's office. At one point the conversation turned to the pros and cons of working union and nonunion. Toward the end of the topic,

Turner told Davidson that Davidson had a job there no matter what happened, and that Davidson could have insurance by paying one half the premium. At that time Davidson paid no part of the cost of the insurance which the Company provided. (Tr. 1:140–142, 151–152.)

c. *Steve Turner*

Complaint paragraph 11 alleges that about March 1991 TAF, acting through Supervisor Steve Turner, promised employees insurance and higher wages if they remained with TAF in the event TAF did not sign another contract with the Union, and impliedly promised that TAF would institute a profit-sharing plan in such circumstances. Phillip Alan Thames testified in support of these allegations.

Phillip Alan Thames has worked for TAF about 7 years, although he left it in August 1991 and returned about June 1992. (Tr. 1:41–41, 47, 52.) Thames works for the Company as an apprentice fitter. (Tr. 1:42.) Thames describes a late March conversation in Supervisor Steve Turner's vehicle as they drove back to the shop from a job at a local bank. Turner, Thames testified, said that if the Company did not sign a union contract that Thames would still have a job at \$14 an hour and still have insurance. Moreover, Turner added that the Company would institute either a pension or profit-sharing plan. (Tr. 1:44–45.) Steve Turner did not testify.

d. *Job foremen not statutory supervisors*

(1) Introduction

Although the recognized bargaining unit under the CBA does not specify foremen (G.C. Exh. 21 at 4), the CBA provides (art. 9) that foremen will be selected by the employer from its journeymen and will be paid \$1.25 per hour more than the journeyman's rate. Under article 9 of the CBA the employer must assign a foreman for each job. Selection of a foreman is the employer's province. (G.C. Exh. 21 at 12.) TAF contends that during the relevant time the unit included two foremen who were statutory supervisors. (Tr. 1:178.) Apparently the two were Jack Moiren and Cecil P. Davidson.

(2) Applicable law

In assessing the facts on this issue, I am guided by the applicable law as summarized in *Adco Electric*, 307 NLRB at 1124. The first important *Adco* point I shall emphasize here is that the party asserting supervisor status has the burden of persuasion on the issue. *Id.* at fn. 3 and 1119.

The second point from the *Adco* summary, which I highlight here is, "Exercise of the authority which derives from a worker's status as a skilled craftsman does not confer supervisory status because that authority is not the type contemplated in the statutory definition." *Id.* at 1120. The third point from the summary is that the powers enumerated at 29 U.S.C. § 152(11) are termed the "primary" indicia of supervisory status. When the issue of supervisory status presents a borderline question, "secondary" indicia may be considered. Nevertheless, "secondary" indicia alone will not confer supervisory status under the Act. *Adco* at 1120. Even the "primary" powers must be linked to the use of or need to exercise independent judgment. *Adco* at 1120.

Finally, "In these cases the Board has a duty to be alert not to construe supervisory status too broadly because the

employee who is deemed a supervisor loses his protected right to organize, a right Congress intended to protect by the Act.” *Adco* at 1120.

(3) Facts

Evidence on the supervisor question is quite limited, with Turner never addressing the matter when he testified. The bulk of the evidence comes from the testimony of Jack Moiren and Cecil P. Davidson, job foremen during the relevant time.

Most of the time the job foremen served as part of three-man crews, the number including themselves. As job foreman Langford in *Adco* at 1124, the job foremen here spend about 90 percent of their time working with the tools and the other 10 percent on paperwork and training their apprentices/helpers. They do not independently hire workers. Instead, the instances in which they successfully recommended that someone, usually a relative, be hired, constitute nothing more than the recommendations of skilled craftsmen referring and recommending others from a pool of qualified craftsmen. That is not indicative of statutory authority. *Adco* at 1120–1124. The testimony by Phillip Alan Thames that he was hired by his foreman uncle, Ronnie Pugh (Tr. 6:955–956, 964), does not establish that Pugh independently hired Thames. The evidence supports the equal inference that Pugh, as a skilled craftsman, simply recommended Thames and Turner authorized Pugh to hire Thames. In the circumstances here, that action does not indicate statutory authority.

Hours and overtime are matters preset by TAF. Although neither Turner would visit some of the jobs outside Mobile, their absence merely reflects the experience level of the job foremen as skilled craftsmen.

Transfers to and from the crews come at the direction of the Turners, generally after discussion with the foremen about the progress of the job. When a larger crew is downsized to fit reduced job needs, any selection of crew members by the job foremen for release back to the office for reassignment is the function of the foremen in their capacity as skilled craftsmen matching crew skills with job needs. The foremen do not resolve grievances. No evidence of disciplinary action by the foremen, exercising independent judgment, was adduced.

(4) Conclusions

TAF has failed to show that the job foremen, and particularly Jack Moiren or Cecil Davidson, possessed any of the primary indicia of a statutory supervisor, or that they exercised any of those powers with independent judgment. As TAF has failed to carry its burden of demonstrating statutory supervisor status on the part of the job foremen, including Jack Moiren and Cecil Davidson, I find that at all relevant times Triple A’s job foremen were statutory employees.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The complaint is dismissed.

²If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.